UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 220

Docket No. SF-0752-09-0040-I-2

Richard Bowen,

Appellant,

v.

Department of the Navy,

Agency.

October 30, 2009

Ali M. Sachani, Esquire, Ventura, California, for the appellant.

Brenda Vosguanian, Esquire, Port Hueneme, California, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant petitions for review of an initial decision that affirmed the agency's removal action. For the following reasons, we GRANT the appellant's petition for review, and AFFIRM the initial decision AS MODIFIED by this Opinion and Order, still SUSTAINING the agency's removal action.

BACKGROUND

¶2 The agency removed the appellant from his GS-14 Utilities and Energy Management Information Systems Program Manager position based on charges of

Failure to Follow Instructions (two specifications),[1] Absence Without Leave (AWOL) (two specifications), and Insubordination (one specification). Initial Appeal File (IAF), Tab 4, Subtabs 4A, 4B, 4O. Under the Failure to Follow Instructions charge, the agency asserted that the appellant failed to (1) follow an order to complete a Platform Embedded Information Technology (IT) outline by April 17, 2008, and a report of the same by April 24, 2008, and (2) comply with a Letter of Requirement issued as a result of excessive/abusive leave usage by (i) failing to request leave or call in on April 14, 2008, and (ii) failing to submit a Standard Form 71 (Request for Leave or Approved Absence) and failing to provide medical documentation for absences on May 13-15, 2008, when he called in sick. *Id*., Subtab 4B at 5-6; *id*., Subtab 4O at 2-3. The agency alleged that the appellant was AWOL from May 13-15, 2008, for a total of 27 hours, and on certain dates between May 19, 2008, and June 30, 2008, for a total of 116 hours. *Id*., Subtab 4B at 7; *id*., Subtab 4O at 4-5. Under the Insubordination charge, the agency alleged that the appellant failed to comply with a Naval Facilities Engineering Service Center (NFESC) notice and his supervisor Mary Lingua's instructions to use a government credit card for official travel; instead, the appellant cancelled the credit card, stated that he had "guaranteed" that he would not be given another card, and explained that he would submit an application for a new credit card if ordered to do so, but would not check the box indicating that he would comply with the terms and conditions of the card. *Id*., Subtab 4O at 5-8. The agency asserted that thereafter the appellant indicated that he was "stuck" on how to set up and process a travel order to attend a necessary meeting because nobody he talked to knew how to use the Defense Travel System (DTS) without a government credit card. *Id*., Subtab 4O at 7.

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[1] The agency's deciding official did not sustain a third specification of Failure to Follow Instructions that had been included in the proposal notice. Initial Appeal File (IAF), Tab 4, Subtab 4B at 6-7.

¶3 On appeal to the Board, the appellant asserted that the agency did not prove its charges, he was entitled to leave under the Family and Medical Leave Act of 1993 (FMLA), the second specification of the Failure to Follow Instructions charge and the AWOL charge in its entirety were not in accordance with law because of his entitlement to FMLA leave, the agency engaged in "double punishment" with respect to the Insubordination charge "as it relates to the use of the Defense Travel System," the agency engaged in whistleblower reprisal, and the penalty did not promote the efficiency of the service and was not reasonable. Refiled Appeal File (RAF), Tab 13 at 13-14.

¶4 After a hearing, the administrative judge (AJ) affirmed the agency's action. RAF, Tab 27, Initial Decision (ID) at 1. The AJ found that the agency proved all of its charges and specifications by preponderant evidence, the appellant did not prove retaliation for whistleblowing because the agency showed by clear and convincing evidence that it would have taken the same action in the absence of his disclosures, the action promoted the efficiency of the service, and the penalty of removal was reasonable, particularly in light of the senior level of the appellant's position, the attendant need for him to exemplify not only technical expertise but the "ability to work with management to constructively resolve problems and issues," and the

> peculiarly brazen nature of the appellant's insubordination surrounding the cancelation of his government credit card and the repeated expressions of his consequential incapacity to travel for business-related reasons, culminating at the hearing in his inability simply to declare that he would ever have used the IBA [Individually Billed Account] card without further qualification.

ID at 2-18. The AJ noted that the appellant testified that he was personally "very against" using an individually-billed government travel card because he had used such a card in the early 1990s and had "gotten into some credit report problems surrounding that usage," and he "disagreed with the terms and conditions of the

card, including some garnishment provisions, which he felt were illegal." ID at 9.

¶5 The appellant has filed a timely petition for review of the initial decision, and the agency has filed a timely response opposing the petition for review.

ANALYSIS

¶6 An initial decision must identify all material issues of fact and law, summarize the evidence, resolve issues of credibility, and include the AJ's conclusions of law and his legal reasoning, as well as the authorities on which that reasoning rests. *Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980). We grant the petition for review to address the appellant's arguments regarding the FMLA, "double punishment," and the propriety of the Insubordination charge, which were not addressed in the initial decision.[2] The

[2] We note that part of one of the specifications underlying the Failure to Follow Instructions charge should not have been sustained. The agency charged the appellant with failing to submit a Standard Form 71 (Request for Leave or Approved Absence) and failing to provide medical documentation for his absences on May 13-15, 2008, when he called in sick. IAF, Tab 4, Subtab 4O at 3. However, the agency's NAVBASE Ventura County Instruction 12630.1, Absences and Leave for Civilian Employees, provides that if an employee fails to submit medical documentation in accordance with a Letter of Requirement, such failure "may be considered a basis for denying sick leave, but shall not be considered an offense justifying disciplinary action." *Id.*, Subtab 4QQ at 17. An agency is required to act in accordance with the procedures it adopts for itself, and the Board will enforce employee rights derived from such rules, regulations, and collective bargaining agreements. *Campbell v. U.S. Postal Service*, 75 M.S.P.R. 273, 279 (1997); *see Sadowski v. Defense Logistics Agency*, 40 M.S.P.R. 655, 658 (1989) (the agency improperly charged the appellant with both AWOL and abuse of sick leave because a management instruction prohibited the use of more than one offense to describe a single incident). Nevertheless, the agency's specification and charge are still sustained even though this part of the specification may not be sustained. *See Diaz v. Department of the Army*, 56 M.S.P.R. 415, 418-20 (1993) (finding a charge proven based on seven specifications, four of which were sustained in part); *Crawford v. Department of the Treasury*, 56 M.S.P.R. 224, 232 (1993) (a partly sustained specification is sufficient to sustain a charge).

remaining arguments on review do not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and provide no basis for disturbing the initial decision.[3]

The Agency Did Not Violate the Appellant's Rights under the FMLA

¶7 The appellant contends that the AJ erred in affirming the agency's second specification under the Failure to Follow Instructions charge and the entire AWOL charge because the agency violated his rights under the FMLA by not offering him FMLA leave and by imposing more stringent requirements in the Letter of Requirement than those set forth under the FMLA. Petition for Review (PFR) at 9-10. The appellant raised this allegation below, RAF, Tab 13 at 14, but the AJ did not address it in the initial decision.[4] On review, the appellant contends that a March 12, 2008 e-mail he sent to Lingua stating that he had work-induced stress, hypertension, and depression resulting in severe headaches, nausea, and insomnia was sufficient to place the agency on notice that he "may qualify for leave under the FMLA." PFR at 8; *see* RAF, Tab 13, Ex. O.

¶8 The FMLA allows an employee to take up to 12 weeks of leave per year (paid or unpaid) for various purposes, including an employee's own serious health condition that makes the employee unable to perform the functions of the

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[3] As the appellant points out on review, Petition for Review at 15, in his discussion of the penalty the AJ incorrectly found that the appellant had received a prior suspension, rather than a prior written reprimand. *See* ID at 17; IAF, Tab 4, Subtab 4EE. Nevertheless, this finding has not prejudiced the appellant's substantive rights because he has not shown any error in the AJ's ultimate determination that the penalty of removal was reasonable; there is, therefore, no basis for reversal of the initial decision. *See Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984).

[4] The agency asserted below that the appellant did not timely raise the FMLA issue and should be precluded from introducing testimony on the issue at the hearing. RAF, Tab 19 at 1-2. The agency does not, however, continue to raise such a claim in its response to the petition for review. In any event, the appellant raised the claim in his timely-filed prehearing submission, *see* RAF, Tab 6 at 2, and Tab 13 at 14, and the parties questioned witnesses regarding the FMLA without objection at the hearing, Hearing Transcript at 167, 232, 350, 392, 394-96. Thus, the agency's initial objection regarding the FMLA has been waived.

employee's position. *See* 5 U.S.C. § 6382(a)(1)(D); *Dias v. Department of Veterans Affairs*, 102 M.S.P.R. 53, ¶ 5 (2006), *aff'd*, 223 F. App'x 986 (Fed. Cir. 2007); 5 C.F.R. § 630.1203(a)(4). An agency may require that a request for such leave be supported by documentation from a health care provider, and the employee must submit this documentation to the agency in a timely manner. 5 U.S.C. § 6383(a); *see Dias*, 102 M.S.P.R. 53, ¶ 5; 5 C.F.R. § 630.1207(a). If FMLA leave for a serious health condition is foreseeable based on planned medical treatment, the employee shall generally provide notice of the intention to take leave not less than 30 calendar days before the date the leave is to begin, and shall consult with the agency and make a reasonable effort to schedule medical treatment so as not to disrupt unduly the operations of the agency. 5 C.F.R. § 630.1206(a)-(b). If the need for leave is not foreseeable and the employee cannot provide 30 calendar days' notice of the need for leave, the employee shall provide notice within a reasonable period of time appropriate to the circumstances involved. 5 C.F.R. § 630.1206(c). An agency may waive the notice requirements under 5 C.F.R. § 630.1206(a) and instead impose the agency's usual and customary policies or procedures for providing notification of leave, but such notification policies or procedures must not be more stringent than the requirements set forth in section 630.1206. 5 C.F.R. § 630.1206(e). An employee is not required to specifically invoke the FMLA in requesting covered leave, but must present sufficient evidence to trigger consideration of the absences under the FMLA. *Fairley v. U.S. Postal Service*, 82 M.S.P.R. 588, 591 (1999). The agency bears the burden of proving that it complied with the FMLA as part of its overall burden of proving a leave-based charge. *Moore v. U.S. Postal Service*, 83 M.S.P.R. 533, ¶ 21 (1999); *Ellshoff v. Department of the Interior*, 76 M.S.P.R. 54, 74 (1997).

¶9 Each agency shall inform its employees of their entitlements and responsibilities under subpart L, Family and Medical Leave, of title 5, Code of Federal Regulations, including the requirements and obligations of employees.

5 C.F.R. § 630.1203(g). Here, the agency complied with this requirement by notifying the appellant in its command leave policy of the above information relating to the FMLA. IAF, Tab 4, Subtab 4QQ at 1, 34-37; Hearing Transcript (HT) at 392. The appellant testified that he received the leave policy but did not read the section relating to the FMLA because he did not believe that the FMLA applied to his own serious health condition, as opposed to those of his family. HT at 392. The appellant has not identified any law, rule, or regulation that required the agency to "offer" him FMLA leave for particular absences under the circumstances of this case. Moreover, although the appellant claims that the agency's Letters of Requirement were more stringent than the "FMLA's leave policy," PFR at 8, those letters, issued on March 27, 2008 and May 29, 2008, informed the appellant that his leave and attendance record presented a pattern of excessive and/or abusive leave, and implemented leave restrictions and requirements including the submission of medical certificates from a health care practitioner in support of sick leave requests that included the dates of services, a description of the illness or injury, a brief description of the treatment received, the exact dates of incapacitation from work, and the medical practitioner's legible name, address, telephone number, and signature; they did not impose more stringent requirements for providing *notification* of leave than those set forth at 5 C.F.R. § 630.1206. IAF, Tab 4, Subtab 4W, 4CC. Moreover, to the extent that the appellant may be alleging that the agency imposed more stringent medical certification requirements than those set forth at 5 C.F.R. § 630.1207(b), we disagree. The agency's Letters of Requirement did not, for example, even fully apply those certification requirements by requiring the appellant to submit a medical statement indicating that he was unable to perform one or more of the essential functions of his position. *See* 5 C.F.R. § 630.1207(b)(5).

¶10 In any event, the record shows that the appellant did not request FMLA leave or sick leave, or otherwise present sufficient evidence to trigger consideration under the FMLA for the absences involved in the second

specification of the Failure to Follow Instructions charge and the AWOL charge. The agency charged the appellant with Failure to Follow Instructions by failing to request leave or call in on April 14, 2008, and with AWOL for May 13-15, 2008, May 19-23, May 27-29, June 23-27, and June 30, 2008. IAF, Tab 4, Subtab 4B at 5-8; *id*., Subtab 4O at 2-5. The appellant's March 12, 2008 e-mail informed Lingua that he had visited his personal physician who referred him to see a psychiatrist or psychologist for stress management, he had work-induced stress, hypertension, and depression resulting in severe headaches, nausea, and insomnia, and his doctor and he believed that "this is from lack of conflict resolution in defining my future, especially where my career direction is going and the lack of priority that you are taking in meeting with me to work on these issues." RAF, Tab 13, Ex. O. Although the appellant wrote that "[n]ow you know why I requested a facilitated meeting and to go on leave from Rick and you in early February because of no progress in working out these issues," he did not request leave or indicate a need for leave in the future. *Id*.

¶11 The appellant ultimately submitted three Verification of Treatment forms from his doctor and one letter from his psychotherapist which showed that the appellant either received medical treatment or followed his doctor's instructions and stayed home on March 5, 2008, March 31, 2008, April 2-3, 2008, April 7, 2008, April 9-10, 2008, April 14, 2008, April 16, 2008, April 21-23, 2008, April 25, 2008, April 28-29, 2008, May 1, 2008, May 3, 2008, May 5-6, 2008, May 8-9, 2008, May 12, 2008, May 16, 2008, June 2-6, 2008, June 9-12, 2008, and June 16-20, 2008. *See* IAF, Tab 4, Subtab 4C at 5; RAF, Tab 13, Ex. R at 2-3; *id*., Ex. S. The appellant has identified nothing in the FMLA or OPM's regulations implementing the FMLA that prohibited the agency from requiring him to call in or request leave on April 14, 2008. Moreover, none of the dates for which the appellant was charged AWOL are covered by the medical certificates he submitted. In fact, the appellant *did* make an April 30, 2008 request for "compensatory time off" for vacations for the periods from May 19-29, 2008, and

from June 23, 2008 to July 3, 2008. IAF, Tab 4, Subtab 4AA at 1, 4, 6. However, these requests were not approved by Lingua. *See* IAF, Tab 4, Subtab 4Z (May 1, 2008 e-mail from Lingua to the appellant indicating that his leave requests would not be approved), 4BB (April 15, 2008 e-mail from Lingua to the appellant ordering him to complete the Platform Embedded IT outline by April 17, 2008, and a report of the same by April 24, 2008, and noting that this was a high-priority task that needed the appellant's immediate attention); HT at 390-91 (testimony of the appellant that although Lingua had not approved his leave request for the period between June 23, 2008 and July 3, 2008, he nevertheless spent a number of those days on a planned trip to Paris, France). The appellant has shown no error or abuse of discretion in the agency's decision to disapprove these requests for compensatory time off. *Cf. Benally v. Department of the Interior*, 71 M.S.P.R. 537, 541 (1996) (annual leave is an entitlement subject to the agency's right to fix the time at which it is taken). Thus, the agency's actions did not violate the FMLA, and the AJ correctly sustained these charges.

The Agency Did Not Impose "Double Punishment" for the Same Misconduct

¶12 The appellant contends that the Insubordination charge constitutes improper double punishment because the agency previously issued a letter of reprimand on March 25, 2008, for his failure to follow a March 3, 2008 written order to use a government credit card to attend a March 6, 2008 meeting in California; the appellant also contends that the use of an individually-billed credit card had not been negotiated with the local union. PFR at 11-12; *see* IAF, Tab 4, Subtab 4II at 1 (March 3, 2008 order). These arguments were raised below but not addressed in the initial decision. *See* RAF, Tab 13 at 9, 14; ID at 7-10.

¶13 The Board has held that an agency cannot impose disciplinary or adverse action more than once for the same misconduct. *See Gartner v. Department of the Army*, 104 M.S.P.R. 463, ¶ 5 (2007). Here, the Insubordination charge underlying the appellant's removal does not impose discipline for the same misconduct underlying the appellant's reprimand, namely, his refusal to use the

government travel card to attend a scheduled meeting in California on March 6, 2008. *See* IAF, Tab 4, Subtab 4EE. In its notice of proposed removal, the agency charged that the appellant, on February 26, 2008, and in response to an instruction from Lingua on the same date, indicated that "I have a problem with using the so-called government credit card," and that "if you do not want to approve the travel orders through the old way till we work this out, I guess I won't be traveling." IAF, Tab 4, Subtab 4O at 5. The agency also charged that on March 3, 2008, Lingua ordered the appellant to use and comply with NFESC Notice 4650.2, which required frequent travelers like the appellant to use government travel cards for payment for their air, auto rental, and hotel costs. *Id.* at 6. On March 4, 2008, Lingua again informed the appellant of the requirement that he use a government credit card, and the appellant told Lingua that she could not make him use such a card, and that he was going to cancel the card online "right now" and would cut up the card. *Id.* at 7. The agency charged the appellant with informing the Business Operations Manager on May 7, 2008, that he had cancelled his government credit card, guaranteed that he would not be given another one, and would not check the box indicating that he would comply with the card's terms and conditions if the agency ordered him to submit another government credit card application. *Id.* Finally, the agency asserted that after Lingua informed the appellant again on May 30, 2008, that he was required to use a government credit card, he replied by e-mail stating, "I have no individual Billed Travel Card so therefore I am stuck on how to setup and process travel orders." *Id.* Rather than simply a refusal to obey a single order on one occasion involving a specific meeting in California, the agency based its insubordination charge in this case on different facts underlying the appellant's "continual refusal to comply" with Lingua's orders to use a government credit card, and the fact that his act of closing his personal government travel card "validates your intentional disobedience and failure to follow my orders and the command policy." *Id.* at 8. Thus, the agency did not discipline the appellant more than once for the same

misconduct, and its Insubordination charge is not invalid on that basis. *See Williams v. Defense Logistics Agency*, 34 M.S.P.R. 54, 58 (1987) (rejecting a claim that the appellant was improperly disciplined twice for the same offense because the charges, though related, depended on different facts).

¶14 The appellant also claims on review that Lingua's order to use a government credit card was not authorized because the agency did not complete its bargaining obligations with respect to such use with the local union. PFR at 10-11. In support of this argument, the appellant relies upon a February 12, 2008 memorandum from Douglas A. Brook, Assistant Secretary of the Navy for Financial Management and Comptroller, regarding "Mandatory Use of the Government Travel Charge Card (GTCC) Individually Billed Account (IBA)." RAF, Tab 13, Ex. N. Brook's memo states that "effective immediately, all DON [Department of the Navy] personnel and all non-bargaining unit employees who are frequent travelers shall use the GTCC IBA as the primary procurement method for all official Temporary Duty travel costs, to include transportation." *Id*. The memo further provides that "[f]or employees that are members of bargaining units, the change is effective upon completion of local bargaining obligations." *Id*.

¶15 The Commanding Officer of the NFESC issued NFESC Notice 4650.2 on February 29, 2008, which provided in relevant part that "[a]s of 3 March 2008, all NFESC travelers, West and East Coast, will be required to use DTS to arrange travel and make travel claims," and "frequent travelers will be required to use Government Travel Cards for payment of their air, auto rental, and hotel costs." IAF, Tab 4, Subtab 4II at 2-3. There is no dispute that the appellant was a "frequent traveler." *See id*. at 2 (defining "frequent traveler" as a person who travels two or more times a year); HT at 372 (testimony of the appellant that he was probably the "poster child" for frequent traveling). Even assuming that NFESC Notice 4650.2 was subject to bargaining and the requirements set forth in the memo issued by Brook, the appellant has not identified any evidence in the

record showing that there was ongoing local bargaining on the issue or any such obligations at the time NFESC Notice 4650.2 was issued. In any event, the Board has held that an employee does not have the unfettered right to disregard an order merely because there is substantial reason to believe that the order is not proper; rather, he must first comply with the order and then register his complaint or grievance, except in certain limited circumstances where obedience would place the employee in a clearly dangerous situation, or when complying with the order would cause him irreparable harm, neither of which is present here. *See Pedeleose v. Department of Defense*, 110 M.S.P.R. 508, ¶ 16-18 (2009), *aff'd*, No. 2009-3135 (Fed. Cir. June 6, 2009) (NP), *Cooke v. U.S. Postal Service*, 67 M.S.P.R. 401, 407-08, *aff'd*, 73 F.3d 380 (Fed. Cir. 1995) (Table). Thus, even if the appellant believed that the order was improper because bargaining had not been completed, he was required to first comply with the order and then register his complaint or grievance.

The AJ Did Not Abuse his Discretion in Denying a Requested Witness

¶16 The appellant asserts that the AJ improperly disallowed Steve Ehret as witness because Ehret would have testified that the agency treated Ehret similarly to the appellant after Ehret made whistleblowing disclosures. PFR at 16-18. The appellant asserted below that Ehret, who was retired, would testify "about the facts in the final paragraph of these pre-hearing submissions," and that his testimony would show a pattern or practice of retaliation taken by NFESC against whistleblowers. RAF, Tab 13 at 16. The appellant alleged that NFESC began to "treat Mr. Ehret in ways similar to the Appellant" after Ehret made whistleblowing disclosures, such as canceling leave for a vacation, giving Ehret a critical assignment, not giving Ehret feedback on the assignment, and having Richard Messock, the deciding official in this case, tell Ehret that the agency "could remove him within 30 days if they wanted to," and that Ehret ultimately applied for and was appointed to a different agency job overseas. *Id.* at 12-13. After the AJ did not approve Ehret as a witness, RAF, Tab 20, the appellant

objected to the denial and asserted that, under Federal Rule of Evidence 406 and the Board's decision in *Umshler v. Department of the Interior*, 44 M.S.P.R. 628, 631 (1990), Ehret should have been permitted to testify to show a pattern of retaliation by NFESC toward whistleblowers. RAF, Tab 22 at 1-2.

¶17 An AJ has wide discretion under 5 C.F.R. § 1201.41(b)(8), (10) to exclude witnesses where it has not been shown that their testimony would be relevant, material, and nonrepetitious. *Franco v. U.S. Postal Service*, 27 M.S.P.R. 322, 325 (1985). Although the Federal Rules of Evidence do not apply to Board proceedings, the Board will look to them for guidance. *Hayden v. U.S. Postal Service*, 15 M.S.P.R. 296, 302 (1983), *aff'd*, 758 F.2d 668 (Fed. Cir. 1984) (Table). Federal Rule of Evidence 406 provides that evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice. Adequacy of sampling and uniformity of response can be considered controlling considerations in determining whether a practice of an organization is so consistent that it becomes habitual or routine. *Goldsmith v. Bagby Elevator Company, Inc.*, 513 F.3d 1261, 1285 (11th Cir. 2008). Thus, it is only when the examples offered to establish such pattern of conduct or habit are numerous enough to base an inference of systematic conduct and to establish a regular response to a repeated specific situation, or where the examples are sufficiently regular or the circumstances sufficiently similar to outweigh the danger, if any, of prejudice and confusion, that they are admissible to establish a habit or routine practice. *Id*.

¶18 Here, the appellant's proffer of the testimony of a single individual who left the agency in 2000[5] does not rise to the level of a habit or routine on the part

[5] The appellant submitted a copy of Ehret's resume, which shows that Ehret worked as the head of the Shore Facilities Department at NFESC from 1993 to 2000, when he left to begin working as a Navy Science Advisor in London. RAF, Tab 13, Ex. U at 1.

of the agency. *See Goldsmith*, 513 F.3d at 1285-86 (four examples were not enough to support an inference of retaliation for discrimination complaints; in addition, each employee was terminated in response to different situations); *Elion v. Jackson*, 544 F. Supp. 2d 1, 8 (D.D.C. 2008) (among the factors to consider in determining whether testimony of past discriminatory or retaliatory behavior toward other employees is relevant and sufficiently more probative than unfairly prejudicial is whether the past behavior by the employer is close in time to the events at issue). Even assuming, however, that a single witness would be enough to establish a habit or routine, *cf. Umshler*, 44 M.S.P.R. at 631 (the AJ erred by denying both witnesses the appellant requested to establish that the agency engaged in a pattern and practice of using directed reassignments for improper purposes), the appellant did not show that he and Ehret were similarly situated, *see Wagner v. Environmental Protection Agency*, 54 M.S.P.R. 447, 453-54 (1992) (the AJ did not abuse his discretion in denying a request for five witnesses to establish a pattern of reprisal for whistleblowing because the witnesses were not similarly situated to the appellant), *aff'd*, 996 F.2d 1236 (Fed. Cir. 1993) (Table). The appellant, for example, did not assert that the acting official or officials knew of Ehret's alleged disclosures and either removed Ehret or even proposed Ehret's removal within a period of time such that a reasonable person could conclude that the disclosures were a contributing factor in a personnel action. Thus, for all of the above reasons, the appellant has not shown an abuse of discretion in the AJ's determination to deny the appellant's request to have Ehret testify at the hearing.[6]

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[6] The appellant also contends that the AJ should have held a live hearing rather than a hearing by videoconference because the AJ's ability to make credibility determinations was limited, "[t]his appeal was about credibility," and he filed an objection to the video hearing below. PFR at 18. There is, however, no statutory mandate for unlimited entitlement to an in-person hearing, and AJs may hold videoconference hearings in any case, regardless of whether the appellant objects. *See Campbell v. Department of Defense*, 102 M.S.P.R. 178, ¶ 9 (2006); *Koehler v. Department of the Air Force*, 99 M.S.P.R. 82, ¶¶ 10, 13 (2005). The appellant further asserts that the AJ did not allow him to make a closing argument or file a closing brief, which limited his

¶19 Accordingly, we AFFIRM the initial decision AS MODIFIED by this Opinion and Order, still SUSTAINING the agency's removal action.

ORDER

¶20 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

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opportunity to fairly present his case. PFR at 19. The appellant, however, has not cited to any law, rule, or regulation requiring that he be afforded an opportunity to make a closing argument or file a closing brief. In fact, closing arguments and the submission of post-hearing briefs are committed to the AJ's discretion, *see Ford v. Department of the Navy*, 43 M.S.P.R. 495, 500 (1990); MSPB Judge's Handbook, ch. 10, § 9(d), and the appellant has shown no abuse of discretion by the AJ in this regard.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.